

**In The Matter Of:**  
*AMERICAN ZURICH INSURANCE COMPANY, ET AL v.*  
*J. CRISMAN PALMER, ET AL*

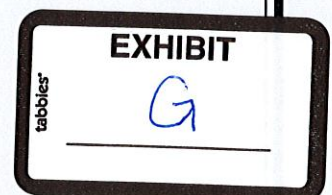
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*WITNESS: MIKE ABOUREZK*  
*September 1, 2022*

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*PRUSS REPORTING*  
*662 Enchanted Pines Drive*  
*Rapid City, South Dakota 57701*  
*(605) 390-3427*  
*prussreporting@gmail.com*

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<p>1 Q Starting on page 10 through page 13 of</p> <p>2 Exhibit 58 -- and I'm using the page numbers at</p> <p>3 the top from the court filing --</p> <p>4 A Right.</p> <p>5 Q -- are a series of proposed additional affirmative</p> <p>6 defenses; is that correct?</p> <p>7 A I think starting at page 9.</p> <p>8 Q 9 on the bottom pagination, right?</p> <p>9 A Oh, you're right. You're right. Page 10 has the</p> <p>10 filing stamp.</p> <p>11 Q Too many numbers.</p> <p>12 A Yeah.</p> <p>13 Q When you saw the request to add the first</p> <p>14 affirmative defense, failure to exhaust</p> <p>15 administrative remedies, did that create</p> <p>16 concerns -- any concern for you in prosecuting the</p> <p>17 plaintiff's case in this matter?</p> <p>18 A No. There had already been rulings and I knew</p> <p>19 that the most conservative -- or I should say the</p> <p>20 ruling that was closest to the boundary I could</p> <p>21 clear pretty easy, so there wasn't any concern</p> <p>22 over that defense.</p> <p>23 Q How about the second affirmative defense, failure</p> <p>24 to submit to primary jurisdiction? Did that</p> <p>25 proposed additional affirmative defense create any</p>	<p>1 that's the work comp title. And the Department of</p> <p>2 Labor doesn't have any -- doesn't even have</p> <p>3 jurisdiction to deal with non-work comp matters</p> <p>4 like bad faith damages.</p> <p>5 Q How do the bad faith damages compare to the</p> <p>6 damages -- or remedies that are available under</p> <p>7 the work comp statutes?</p> <p>8 A How do they compare?</p> <p>9 Q Yeah. I mean, you indicated that, you know, the</p> <p>10 settlement was the work comp side. And that isn't</p> <p>11 the bad faith damages that you were seeking. How</p> <p>12 are they different?</p> <p>13 A Work comp has a schedule of benefits. Has a</p> <p>14 schedule of payments. It requires payment of</p> <p>15 medical expenses. It requires payment of</p> <p>16 temporary total disability and payment of</p> <p>17 permanent total disability or permanent partial</p> <p>18 disability. Those -- those are specific work comp</p> <p>19 benefits. And there are some other benefits,</p> <p>20 retraining, and so on.</p> <p>21 But applicable to this case, the central</p> <p>22 focus was that they -- they refused to pay any</p> <p>23 further medical expenses, and so he stopped</p> <p>24 getting treatment for pain. He was getting</p> <p>25 epidural steroid blocks and treatment for pain.</p>
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<p>1 concerns for you in prosecuting this case?</p> <p>2 A No. The case had already been submitted to the</p> <p>3 Department of Labor.</p> <p>4 Q How about the third affirmative defense,</p> <p>5 res judicata? Did that proposed defense create</p> <p>6 any concerns for you in prosecuting the case?</p> <p>7 A No.</p> <p>8 Q Why not?</p> <p>9 A Well, the settlement agreement said that he was</p> <p>10 entitled to benefits, not that he wasn't entitled</p> <p>11 to them. It said that they would accept</p> <p>12 liability -- I'm trying to remember the wording,</p> <p>13 and I don't remember the exhibit number here, but</p> <p>14 the settlement agreement supported that Zurich was</p> <p>15 responsible, had accepted liability for medical</p> <p>16 expenses.</p> <p>17 Q Item number four -- or the fourth affirmative</p> <p>18 defense, release, did seeing that additional</p> <p>19 proposed affirmative defense create any concerns</p> <p>20 from you in prosecuting the case?</p> <p>21 A No, because he hadn't released any of the damages</p> <p>22 sought in the bad faith complaint. This was a</p> <p>23 work comp settlement. And it says right in the</p> <p>24 first part of the document that it is pursuant to</p> <p>25 Title 62. And I forget the statute number. But</p>	<p>1 And by denying that, he went three or four years,</p> <p>2 it seems like, without being able to get</p> <p>3 treatment.</p> <p>4 Q Is pain and suffering a recoverable element of</p> <p>5 damage under South Dakota law in worker's</p> <p>6 compensation proceedings?</p> <p>7 A Right, it is, along with emotional distress. And</p> <p>8 neither one of those are part of the work comp</p> <p>9 compensation scheme.</p> <p>10 Q I'm going to reask the question because I think we</p> <p>11 miscommunicated.</p> <p>12 A Okay.</p> <p>13 Q Under the work comp scale can you recover</p> <p>14 emotional distress or pain and suffering?</p> <p>15 A No.</p> <p>16 Q Can you recover those as elements of damage in a</p> <p>17 bad faith case in South Dakota?</p> <p>18 A Yes.</p> <p>19 Q And were you seeking those damages here?</p> <p>20 A Yes.</p> <p>21 Q The Exhibit 58, item number five, the fifth</p> <p>22 affirmative defense, statute of limitations,</p> <p>23 did -- when you saw that Zurich was seeking to add</p> <p>24 that affirmative defense, did that create any</p> <p>25 concerns for you in prosecuting this action?</p>



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1 A No.

2 Q Do you know what the -- at least the District of

3 South Dakota has ruled is the applicable statute

4 of limitations for bad faith in South Dakota?

5 A Yes, I do.

6 Q What is it?

7 A Six years.

8 Q Do you recall ever being concerned that you had

9 any statute of limitations in this case?

10 A No, I don't recall having any concern about that.

11 Q The sixth affirmative defense, failure to

12 mitigate, did that additional potential

13 affirmative defense create any concern for you in

14 prosecuting the case?

15 A I thought it was a joke. It's just boilerplate.

16 Boilerplate and garbage.

17 Q How about number seven, superseding cause? When

18 you saw that did that create any concerns for you

19 in prosecuting your claims against Zurich?

20 A No. This is -- that's just going through the list

21 of affirmative defenses and claiming every one of

22 them, regardless of whether there is any scintilla

23 of merit to it.

24 Q Based upon your work in this file, were you aware

25 of any affirmative defenses that you were

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1 concerned would be asserted against you?

2 A No.

3 Q So I assume your answer for number eight, setoff,

4 would be the same, that didn't concern you when

5 you saw it?

6 A Well, no. If there was -- if they were entitled

7 to any setoff -- and I'm -- I'm not recalling that

8 they were, but if they were entitled to one, I

9 don't care if they get it.

10 Q And then the improper party, looking at

11 paragraph 9 of the affirmative defense, it

12 indicates plaintiff's cause of action is barred

13 against Zurich North America because it's merely a

14 trade style used by ZAIC, and it continues. Is

15 that the same issue that you exchanged

16 correspondence with Cris Palmer about early in the

17 case?

18 A Yes.

19 Q And you told him why you disagreed with him

20 legally, correct?

21 A Yeah, I told him why I disagreed with it. But

22 even if -- even if you assume that there was merit

23 to this, all that means is one of these corporate

24 entities isn't going to be a defendant. That

25 doesn't relieve the other corporate entities from

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1 being defendants. So it's not a big deal.

2 (Whereupon, Exhibit 59 was then marked.)

3 Q (BY MR. SUTTON) Mike, you've been handed Exhibit 59

4 which is Zurich's Rule 12(c),(h)(2)(b) Motion to

5 Dismiss.

6 MR. SUTTON: Habits die hard. I'm trying to

7 make your life easier. Maybe it's worse. Sorry.

8 If I started talking to my wife that way, someone

9 can slap me. That you can put on the record.

10 Q (BY MR. SUTTON) Did you receive this Motion to

11 Dismiss that was filed on behalf of?

12 A Yes.

13 Q And what is the date of this filing?

14 A September 7, 2018.

15 (Whereupon, Exhibit 60 was then marked.)

16 Q (BY MR. SUTTON) Mike, have you -- do you have in

17 front of you Exhibit 60?

18 A Yes.

19 Q And is this Zurich's brief in support of the

20 motion to dismiss that was Exhibit 59 that we

21 looked at?

22 A Yes.

23 Q And then will you look at Exhibit 14?

24 A Okay. I got it.

25 Q Is Exhibit 14 your response in opposition to the

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1 Motion to Amend and the Motion to Dismiss?

2 A Yes, it is.

3 MR. SUTTON: Let's go off the record for a

4 second.

5 (Off the record.)

6 Q (BY MR. SUTTON) Will you please turn to Exhibit 12,

7 Mike?

8 A Okay.

9 Q And does Exhibit 12 -- is that the reply brief

10 that you received from Zurich in support of both

11 its motion -- in support of both its Motion to

12 Amend the Answer as well as a Motion to Dismiss?

13 A Yes.

14 Q Will you please turn to GPNA 719 on Exhibit 12?

15 A Yes. I'm there.

16 MR. HOYT: What page is that?

17 MR. SUTTON: That's page 11 of the brief.

18 Q (BY MR. SUTTON) What did you understand the

19 argument being made by Zurich to support dismissal

20 of your bad faith case?

21 A That he -- that he, Joe Leichtnam, never obtained

22 a final decision from the Department --

23 South Dakota Department of Labor establishing that

24 he was denied worker's compensation benefits to

25 which he was entitled. It says it here